# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. 188.

ABEL H. PIERCE AND JAMES D. REED, PARTNERS AS PIERCE & REED, PLAINTIFFS IN ERROR,

vs.

WILLIAM S. TOUGH AND CHARLES L. VANDERPOOL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

**FILED SEPTEMBER 26, 1877.**

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1 UNITED STATES OF AMERICA,
*District of Kansas:*

In the circuit court of the United States for the district of Kansas.

ABEL H. PIERCE AND JAMES D. REED, PARTNERS in business under the firm name of Pierce & Reed, plaintiffs,
*vs.*
WILLIAM S. TOUGH AND CHARLES L. VANderpool, defendants. } 1128.

Be it remembered that on this day, to wit, the 9th day of October, 1874, the said plaintiffs, by Martin & Case, their attorneys, filed in the clerk's office of said court their petition, precipe, security for costs, affidavit for replevin, consent to filing bond, and their replevin bond in the above entitled action, which said petition, precipe, security for costs, affidavit for replevin, consent to filing bond, and replevin bond, with the endorsements thereon, are in the words and figures following, to wit:

*Petition.*

UNITED STATES OF AMERICA,
*District of Kansas, ss:*

In the circuit court of the United States for the eighth circuit and district of Kansas.

ABEL H. PIERCE AND JAMES D. REED, PARTNERS in business under the firm name of Pierce & Reed, plaintiffs,
*vs.*
WILLIAM S. TOUGH AND CHARLES L. VANderpool, defendants. } Petition.

The plaintiffs say—

2 I. They are residents and citizens of the State of Texas.

II. The defendants are residents and citizens of the State ot Kansas.

III. The plaintiffs are partners in business under the firm name of Pierce & Reed.

IV. They are the legal owners and entitled to the immediate possession of the following described personal property, namely:

Four hundred and seventy-nine (479) head of Texas cows, branded with a horseshoe mark on the left hip, and from two to ten years old, known as the Oty Lawen herd.

Four hundred and forty-two (442) head of Texas steers, branded with a horseshoe mark on the lelf hip, varying from two to six years old, and known as the Aleck McDonald herd.

Four hundred and ten (410) head of Texas steers, branded with a horseshoe mark on the left hip, varying from two to six years old, and known as the Aleck Wood herd.

Four hundred and twenty-seven (427) head of Texas steers, branded with a horseshoe mark on the left hip, varying from two to six years old, and known as the Fenton herd.

Four hundred (400) head of Texas steers, branded with a horseshoe mark on the left hip, varying from two to six years old, and known as the West herd.

Four hundred & thirty-three (433) head of Texas steers, branded with a horseshoe mark on the left side, varying from two to six years old, and known as the Murphey herd.

Six hundred and sixty-five (665) head of Texas steers, branded with a horseshoe mark on the left hip, varying from two to six years old, and known as the Seltzer & Chipman herds.

Three hundred and sixty head of Texas steers, branded with a horseshoe mark on the left hip, varying from two to six years old, and known as the Meeta herd.

Four hundred (400) head of Texas steers, branded with a horseshoe mark on the left hip, varying from two to six years old, and known as the Fuller herd.

Four hundred and fifty (450) head of Texas steers, varying from
3 two to six years old, all branded with a horseshoe mark on the left side and left hip, known as Adam Dupay's herd.

Four hundred and fifty (450) head of Texas steers, varying from two to six years old, all branded with a horseshoe mark on left hip, known as Horace Griffin's herd.

Four hundred and fifty (450) head of Texas steers, varying from two to six years old, all branded with a horseshoe mark on left hip, known as S. S. Blyton's herd.

Four hundred & fifty (450) head of Texas steers, varying from two to six years old, all branded with a horseshoe mark on left hip, and known as Tom Walker's herd.

Two hundred and twenty-five (225) head of Texas steers, varying from two to six years old, all branded with a horseshoe mark on left hip, and known as John A. Taylor's herd.

Two hundred and twenty-five (225) head of Texas cows & heifers, from one to six years old, all branded with a horseshoe mark on left hip, and known as the Ottinger herd.

Said steers are worth $35.00 per head, and said cows are worth $20.00 per head, and of the aggregate value of two hundred and six thousand six hundred & fifty dollars.

V. The defendants unlawfully and wrongfully detain the said personal property, goods and chattels, in their possession and from the possession of the said plaintiffs, and has so detained the same as aforesaid for the space of three days, to the plaintiffs' damage three hundred thousand dollars.

Wherefore the plaintiffs pray for an order against the said defendants, that they may be ordered to deliver the said personal property to the plaintiffs, and also a judgment against the defendants for the said sum of two hundred and six thousand six hundred and fifty dollars, the value of said property, in case a return thereof cannot be had, and for three hundred thousand dollars, their damages sustained as aforesaid for the unlawful and wrongful detention of said property, and costs of suit.

MARTIN & CASE,
*Attorneys for Plaintiffs.*

4 *Precipe.*

UNITED STATES OF AMERICA,
*District of Kansas, ss:*

In the circuit court of the United States for the eighth circuit and district of Kansas.

ABEL A. PIERCE AND JAMES D. REED, PARTNERS in business under the firm name of Pierce & Reed, plaintiffs,
*vs.*
WILLIAM S. TOUGH AND CHARLES L. VANderpool, defendants.
} Precipe.

The clerk of said court will issue a summons for the defendants, Wm. S. Tough & Chas. L. Vanderpool; also an order of replevin as prayed for in the affidavit of the plaintiff. Direct the summons and order to the and returnable according to law. If default is made, the plaintiff will take judgment for the delivery of the personal property mentioned in the petition, or if a return of said property cannot be had, then a judgment for $206,650.00, the value thereof, and for $300,000.00 damages for the wrongful detention of the same and costs of suit.

MARTIN & CASE,
*Attorneys for Plaintiffs.*

(Endorsed:) No. 1128. Pierce and Reed vs. Wm. S. Tough & Chas. L. Vanderpool. Petition & precipe. Filed October 9, 1874. A. S. Thomas, clerk.

*Security for costs.*

In the circuit court of the United States for the district of Kansas.

ABEL H. PIERCE AND JAMES D. REED, PARTNERS under the firm name of Pierce & Reed, plaintiffs,
*vs.*
WILLIAM S. TOUGH & CHARLES L. VAN-
5 derpool, defendants.

We enter ourselves security for costs in said case, and promise to pay all costs which may accrue to the opposite parties in this action or to any of the officers of this court, and in default of payment by the plaintiffs of any costs ordered or adjudged to be paid by them, we hereby agree and stipulate that execution may issue against our property for any costs taxed against them.

Dated this 8th day of October, 1874.

PIERCE & REED.
A. H. PIERCE.
JACOB SMITH.

(Endorsed:) No. 1128. Pierce & Reed vs. Wm. S. Tough & Cha's L. Vanderpool. Security for costs. Filed Oct. 9, 1874. A. S. Thomas, clerk. Approved. A. S. Thomas, clerk.

*Affidavit for rep'levin.*

UNITED STATES OF AMERICA,
*District of Kansas, ss:*

In the circuit court of the United States for the eighth circuit and district of Kansas.

ABEL H. PIERCE AND JAMES D. REED, PARTNERS in business under the firm name of Pierce & Reed, plaintiffs,
*vs.*
WILLIAM S. TOUGH AND CHARLES L. VANDERPOOL, defendants.
} Affidavit for replevin.

THE STATE OF KANSAS,
*County of Shawnee, ss:*

Abel H. Pierce, of lawful age, being by me first duly sworn, upon oath states that he is one of the plaintiffs in the above entitled action, and that the plaintiffs are the legal owners of the following described personal property, viz:

Four hundred and seventy-nine (479) head of Texas cows, branded with a horseshoe mark on the left hip, and from two to ten years old, known as the Oty Lowen herd.

Four hundred and forty-two (442) head of Texas steers, branded
6 with a horseshoe mark on the left hip, varying from two to six years old each, and known as the Aleck McDonald herd.

Four hundred and ten (410) head of Texas steers, branded with a horseshoe mark on the left hip, varying from two to six years old, and known as the Aleck Wood herd.

Four hundred and twenty-seven (427) Texas steers, branded with a horseshoe mark on the left hip, varying from two to six years old, and known as the Fenton herd.

Four hundred (400) head of Texas steers, branded with a horseshoe mark on the left hip, varying from two to six years old, and known as the West herd.

Four hundred and thirty-three (433) head of Texas steers, branded with a horseshoe mark on the left hip, varying from two to six years old, and known as the Murphey herd.

Six hundred and sixty-five (665) head of Texas steers, branded with a horseshoe mark on the left hip, varying from two to six years old, and known as the Seltzer and Chipman herds.

Three hundred (300) head of Texas steers, branded with a horseshoe mark on the left hip, varying from two to six years old, and known as the Meeta herd.

Four hundred (400) head of Texas steers, branded with a horseshoe mark on the left hip, varying from two to six years old, and known as the Fuller herd.

Four hundred & fifty (450) head of Texas steers, varying from two to six years old, all branded with a horseshoe mark on the left side and left hip, known as Adam Dupay's herd.

Four hundred and fifty (450) head of Texas steers, varying from two to six years old, all branded with a horseshoe mark on left hip, known as Horace Griffin's herd.

Four hundred and fifty (450) head of Texas steers, varying from two to

six years old, all branded with a horseshoe mark on left hip, known as S. S. Blyton's herd.

Four hundred and fifty (450) head of Texas steers, varying from two to six years old, all branded with a horseshoe mark on left hip, and known as Tom Walker's herd.

Two hundred and twenty five (225) head of Texas steers, vary-
7 ing from two to six years old, all branded with a horseshoe mark on left hip, and known as John A. Taylor's herd.

Two hundred and twenty-five (225) head of Texas cows & heifers, from one to six years old, all branded with a horseshoe mark on left hip, and known as the Ottinger herd.

And that the said plaintiffs are entitled to the immediate possession of the said above described property, that the said property is wrongfully detained by the said defendants, that the said property was not taken in execution on any order or judgment against the said plaintiffs or either of them, or for the payment of any tax, fine or amercement assessed against the said plaintiffs or either of them, or by virtue of an order of delivery issued under article 10 of the code of civil procedure of the State of Kansas in replevin or any other mesne or final process issued against the said plaintiffs or either of them, and that the actual value of said property is as follows, viz: Five thousand five hundred & two (5,502) head of Texas steers, branded as hereinbefore described, $35.00 per head, total one hundred and ninety-two thousand five hundred and seventy ($192,570.00) dollars; seven hundred and four head of Texas cows & heifers, as hereinbefore described, $20.00 per head, total fourteen thousand & eighty ($14,080.00) dollars; grand total $206,650.00; said property being now in possession of the said defendants in Shawnee, Jackson, & Wabaunsie Counties, Kansas.

A. H. PIERCE.

Subscribed in my presence and sworn to before me this 9th day of October, A. D. 1874.

[SEAL.] A. S. THOMAS,
*Clerk of the United States Circuit Court for said District.*

(Endorsed:) No. 1128. Pierce and Reed vs. Wm. S. Tough & Chas. L. Vanderpool. Affidavit for replevin. Filed October 9, 1874. A. S. Thomas, clerk.

8 *Consent to filing bond.*

UNITED STATES OF AMERICA,
*District of Kansas, ss:*

In the circuit court of the United States for the eighth circuit and district of Kansas.

PIERCE AND REED, PLAINTIFFS,
*vs.*
WM. S. TOUGH & CHAS. L. VANDERPOOL, DEFENDANTS. } Consent to filing bond.

We consent that the clerk of said court may issue an order of replevin

in the above entitled action upon the bond of Jacob Smith & others for thirty thousand dollars, as now filed in the above entitled action.

Dated this 9th day of October, A. D. 1874.

WM. P. DOUTHITT,
*Attorney for 1st National Bank of Springfield, Illinois.*
GUTHRIE & BROWN,
*Attorney for Stelle, Yost & Co.*
WM. P. DOUTHITT,
GUTHRIE & BROWN,
*Att'ys for Defendants in the above action.*

(Endorsed:) No. 1128. Pierce and Reed vs. Wm. S. Tough & Chas. L. Vanderpool. Consent to filing bond. Filed Oct. 9, 1874. A. S. Thomas, clerk.

*Replevin bond.*

UNITED STATES OF AMERICA,
*District of Kansas, ss:*

In the circuit court of the United States for the eighth circuit and district of Kansas.

ABEL H. PIERCE AND JAMES D. REED, partners in business under the firm name of Pierce & Reed, plaintiffs,
*vs.*
WILLIAM S. TOUGH AND CHARLES L. VANDERPOOL, defendants.
} Replevin bond.

Whereas the plaintiffs above named have commenced an action
9 in replevin in the above entitled court against the above-named defendants, and have filed the affidavit required by law for an order of replevin to be issued by the clerk of said court for the delivery of certain property described therein, and the value of which said property, as therein stated, is the sum of $206,650.00:

Now, therefore, we, Abel H. Pierce and Pierce & Reed, as principals, and Howard M. Holden, Wm. K. Shaffer, J. D. Reed, O. W. Wheeler, Edward H. Allen, J. W. L. Slavins, J. H. Mansur, W. C. Oburn, and Jacob Smith, as sureties, do hereby undertake to and with the said defendants, William S. Tough and Charles L. Vanderpool, in the penal sum of thirty thousand dollars, to the effect that the said plaintiffs shall duly prosecute the said action and pay all costs and damages which may be awarded against them, and if the said property be delivered to them, that they will return the same to the said defendants, if a return thereof be adjudged.

Witness our hands and seals this 8th day of October, A. D. 1874.

| | |
|---|---|
| PIERCE & REED. | [SEAL.] |
| A. H. PIERCE. | [SEAL.] |
| HOWARD M. HOLDEN. | [SEAL.] |
| WM. K. SHAEFFER. | [SEAL.] |
| J. D. REED. | [SEAL.] |
| O. W. WHEELER. | [SEAL.] |
| JACOB SMITH. | [SEAL.] |
| EDWARD H. ALLEN. | [SEAL.] |
| J. W. L. SLAVENS. | [SEAL.] |
| J. H. MANSUR. | [SEAL.] |
| W. C. OBURN. | [SEAL.] |

The above undertaking and the sureties thereto approved by me this 9 day of October, A. D. 1874, as per stipulation filed herein.

[SEAL.] A. S. THOMAS,
*Clerk of the U. S. Circuit Court for the District of Kansas.*

of lawful age, being first duly sworn, says that he is worth the sum of thousand dollars over and above all exemptions allowed by law, and over and above all his debts and
10 liabilities of every kind.

Subscribed in my presence and sworn to before me this day of October, A. D. 1874.

of lawful age, being first duly sworn, says that he is worth the sum of thousand dollars, over and above all exemptions allowed by law, and over and above all his debts and liabilities of every kind.

Subscribed in my presence and sworn to before me this day of October, A. D. 1874.

of lawful age, being first duly sworn, says that he is worth the sum of thousand dollars over and above all exemptions allowed by law, and over and above all his debts and liabilities of every kind.

Subscribed in my presence and sworn to before me this day of October, A. D. 1874.

of lawful age, being first duly sworn, says that he is worth the sum of thousand dollars over and above all exemptions allowed by law, and over and above all his debts and liabilities of every kind.

Subscribed in my presence and sworn to before me this day of October, A. D. 1874.

11 (Endorsed:) No. 1128. Pierce & Reed vs. Wm. S. Tough & Chas. L. Vanderpool. Replevin bond. Filed Oct. 9, 1874. A. S. Thomas, clerk.

And on the same day, to wit, the 9th day of October, 1874, the clerk of said court issued a writ of summons and order of delivery on the defendants in the above-entitled action, which said writ of summons and order of delivery, with the endorsements and the U. S. marshal's return thereon, are in the words and figures following, to wit:

*Summons.*

Circuit court of the United States of America, district of Kansas, ss:

The United States of America to Chester Thomas, jr., special United States marshal of the district of Kansas, greeting:

You are hereby commanded to notify William S. Tough and Charles L. Vanderpool that they have been sued by Abel H. Pierce and James D. Reed, partners in business under the firm name of Pierce & Reed, in

the circuit court of the United States for the district of Kansas, and that unless they answer by the eighth day of November, A. D. 1874, the petition of the said Abel H. Pierce and James D. Reed, partners in business under the firm name of Pierce & Reed, against them, filed in the clerk's office of the said court, such petition will be taken as true and judgment rendered accordingly. You will make due return of this writ on the 19th day of October, A. D. 1874.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Topeka, in said district, this 9th day of October, A. D. 1874.

[SEAL.] A. S. THOMAS, *Clerk.*

(Endorsed:) No. 1128. Circuit court of the United States, district of Kansas. Pierce and Reed vs. Wm. S. Tough & Chas. L. Vanderpool. Summons. Issued Oct. 9th, 1874. Returnable Oct. 19th, 1874. Martin & Case, attorney' for plaintiff.

12 We hereby waive copies and accept service for each of the within-named defendants, Wm. S. Tough and Chas. L. Vanderpool, this 10th day of October, A. D. 1874.

WM. P. DOUTHITT,
GUTHRIE & BROWN,
*Att'y' for Defend.*

I received this writ October 9th, A. D. 1874, at 5 o'clock p. m., and for service of the same see acceptance of service above endorsed. Topeka, October 12th, A. D. 1874. Chester Thomas, jr., special United States marshal, dist. of Kas. Fees, ser. 4.00; 40 miles, 2.40; 6.40. Filed October 12th, A. D. 1874.

A. S. THOMAS, *Clerk.*

*Order of delivery.*

THE UNITED STATES OF AMERICA,
*District of Kansas, ss:*

In the circuit court of the United States, in and for said district.

The United States of America to Chester Thomas, jr., special United States marshal for the district of Kansas, greeting:

Whereas Abel H. Pierce and James D. Reed, partners in business under the firm name of Pierce & Reed, have commenced a civil action in the circuit court of the United States for the district of Kansas against William S. Tough and Charles L. Vanderpool for the recovery of the following-described specific personal property, to wit:

Four hundred and seventy-nine (479) head of Texas cows, branded with a horse-shoe mark on the left hip, and from two to ten years old, known as the Oty Lowen herd.

Four hundred and forty-two (442) head of Texas steers, branded with a horse-shoe mark on the left hip, varying from two to six years old, and known as the Aleck McDonald herd.

Four hundred and ten (410) head of Texas steers, branded with a horse-shoe mark on the left hip, varying from two to six years old, and known as the Aleck Wood herd.

Four hundred and twenty-seven (427) head of Texas steers, branded with a horse-shoe mark on the left hip, varying from two to six years old, and known as the Fenton herd.

Four hundred (400) head of Texas steers, branded with a horse-shoe mark on the left hip, varying from two to six years old, and known as the West herd.

13 Four hundred and thirty-three (433) head of Texas steers, branded with a horse-shoe mark on the left side, varying from two to six years old, and known as the Murphey herd.

Six hundred and sixty-five (665) head of Texas steers, branded with a horse-shoe mark on the left hip, varying from two to six years old, and known as the Seltzer & Chipman herds.

Three hundred and sixty head of Texas steers, branded with a horse-shoe mark on the left hip, varying from two to six years old, and known as the Meeta herd.

Four hundred (400) head of Texas steers, branded with a horse-shoe mark on the left hip, varying from two to six years old, and known as the Fuller herd.

Four hundred and fifty (450) head of Texas steers, varying from two to six years old, all branded with a horse-shoe mark on the left side and left hip, known as Adam Dupay's herd.

Four hundred and fifty (450) head of Texas steers, varying from two to six years old, all branded with a horse-shoe mark on left hip, known as Horace Griffin's herd.

Four hundred and fifty head (450) head of Texas steers, varying from two to six years old, all branded with a horse-shoe mark on left hip, known as S. S. Blyton's herd.

Four hundred & fifty (450) head of Texas steers, varying from two to six years old, all branded with a horse-shoe mark on left hip, and known as Tom Walker's herd.

Two hundred and twenty-five (225) head of Texas steers, varying from two to six years old, all branded with a horse-shoe mark on left hip, and known as John A. Taylor's herd.

Two hundred and twenty-five (225) head of Texas cows and heifers, from one to six years old, all branded with a horse-shoe mark on left hip, and known as the Ottinger herd.

Said steers are worth $35.00 per head, and said cows are worth $20.00 per head, and of the aggregate value of two hundred and six thousand six hundred and fifty dollars.

And have filed an affidavit and an undertaking to obtain an order for the immediate delivery of said property.

14 These are therefore to command you, the said Chester Thomas, jr., special United States marshal, to take the said personal property and deliver the same to the said Abel H. Pierce and James D. Reed, partners in business under the firm name of Pierce & Reed. And of this order with your proceedings thereon you will make due return on the 19th day of October, A. D. 1874.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Topeka, in said district, this ninth day of October, A. D. 1874.

[SEAL.] A. S. THOMAS, *Clerk.*

(Endorsed:)

We hereby waive copies and accept service of the within writ for each of the within named defendants, William S. Tough & Charles L. Vanderpool, this 10th day of October, A. D. 1874.

WM. T. DOUTHITT,
GUTHRIE & BROWN,
*Att'ys for Defend'.*

No. 1128. Pierce and Reed vs. Wm. S. Tough & Chas. L. Vanderpool. Order of delivery. Issued October 9th, 1874. Martin & Case, pl'ff's attorneys.

I received this writ October 9th, A. D. 1874, at 5 o'clock p. m., and by virtue of the within order, on the 10th day of October, A. D. 1874, at 2 o'clock p. m., I did take into my possession from the within named defendants the following described specific personal property, to wit:

Four hundred and seventy-nine (479) head of Texas cows, branded with a horse-shoe mark on the left hip, and from two to ten years old, known as the Oty Lowen herd.

Four hundred and forty-two (442) head of Texas steers, branded with a horse-shoe mark on the left hip, varying from two to six years old, and known as the Aleck McDonald herd.

Four hundred and ten (410) head of Texas steers, branded with a horse-shoe mark on the left hip, varying from two to six years old, and known as the Aleck Wood herd.

15 Four hundred and twenty-seven (427) head of Texas steers, branded with a horse-shoe mark on the left hip, varying from two to six years old, and known as the Fenton herd.

Four hundred (400) head of Texas steers, branded with a horse-shoe mark on the left hip, varying from two to six years old, and known as the West herd.

Four hundred and thirty-three (433) head of Texas steers, branded with a horse-shoe mark on the left side, varying from two to six years old, known as the Murphy herd.

Six hundred and sixty-five (665) head of Texas steers, branded with a horse-shoe mark on the left hip, varying from two to six years old, known as the Seltzer and Chipman herd.

Three hundred and sixty (360) head of Texas steers, branded with a horse-shoe mark on the left hip, from two to six years old, and known as the Meeta herd.

Four hundred (400) head of Texas steers, branded with a horse-shoe mark on the left hip, varying from two to six years old, known as the Fuller herd.

And I did at 3 o'clock p. m., of October 10th, A. D. 1874, deliver to the within named plaintiffs, Pierce and Reed, all of the above described property, their receipt for which is herewith returned, marked A. For service of the within order, see acceptance hereon endorsed, and without further proceedings by me I return this writ by order of plaintiffs' attorneys, this 12th day of October, A. D. 1874.

CHESTER THOMAS, JR.,
*Special United States Marshal for the District of Kansas.*

Fees: Service, $4.00; 40 miles, 2.40; copying 16 folios, 1.80—$8.20.

A.

KINGVILLE, SHAWNEE COUNTY,
*District and State of Kansas:*

OCT. 10, 1874.

Received of Chester Thomas, jr., of the county of Swawnee, in the State of Kansas, special United States marshal for said district,
16 the following described specific property, to wit:

Four hundred and seventy-nine (479) head of Texas cows, branded with a horse-shoe mark on the left hip, and from two to ten years old, and known as the Oty Lowen herd.

Four hundred and forty-two (442) head of Texas steers, branded with a horse-shoe mark on the left hip, varying from two to six years old, and known as the Aleck McDonald herd.

Four hundred and ten head of Texas steers, branded with a horse-shoe mark on the left hip, varying from two to six years old, and known as the Aleck Wood herd.

Four hundred and twenty-seven head of Texas steers, branded with a horse-shoe mark on the left hip, varying from two to six years old, and known as the Fenton herd.

Four hundred head of Texas steers, branded with a horse-shoe mark on the left hip, varying from two to six years old, and known as the West herd.

Four hundred and thirty three head of Texas steers, branded with a horse-shoe mark on the left side, varying from two to six years old, known as the Murphy herd.

Six hundred and sixty-five head of Texas steers, branded with a horse-shoe mark on the left hip, varying from two to six years old, and known as the Seltzer & Chipman herds.

Three hundred and sixty head of Texas steers, branded with a horse-shoe mark on the left hip, varying from two to six years old, and known as the Meeta herd.

Four hundred head of Texas steers, branded with horse-shoe mark on the left hip, varying from two to six years old, and known as the Fuller herd.

Being all the property levied upon by the United States marshal for the district of Kansas in the following cases: The First National Bank of Springfield, Illinois vs. Andrew Wilson, No. 1030; Stelle, Yost & Co. vs. Andrew Wilson, No. 952.

PIERCE & REED.

Returned and filed October 12, 1874.

A. S. THOMAS, *Clerk.*

17 And on this day, to wit, the 9th day of October, 1874, the clerk of said court made the following entry in the journal of said court, to wit:

*Journal entry.*

FRIDAY, *October 9th*, 1874.

ABEL H. PIERCE AND JAMES D. REED, partners in business under the firm name of Pierce & Reed, pl'ffs,
*vs.*
WILLIAM S. TOUGH AND CHARLES L. VANDERPOOL, def'ts. } 1128.

Whereas it appears to my satisfaction that William S. Tough, one of the above named defendants, is the marshal of the United States for the district of Kansas, and that Charles L. Vanderpool, the other defendant, is a deputy United States marshal for the district of Kansas, and by reason thereof said defendants are not qualified to serve process in said action. It is therefore now ordered by me that Chester Thomas, jr., of the county of Shawnee, in the State of Kansas, be, and he is hereby, appointed a special United States marshal, for the district of Kansas, for the purpose and with full power and authority to receive, execute,

and return all summons', writs, orders, subpœnas, or other processes that may be at any time issued in the above entitled action. Ordered that the clerk of the United States circuit court for the district of Kansas enter this order in full on the journal of said court.

Done at chambers, at Atchison, in said district, on the 8th day of October, A. D. 1871.

C. G. FOSTER,
*U. S. District Judge.*

Filed October 9, 1874.

And on this day, to wit, the 9th day of November, 1874, the said defendants, by their attorneys, Guthrie & Brown and Wm. P. Douthitt, filed in the clerk's office of the said court their answer in the above entitled action, which said answer with the endorsements thereon
18 is in the words and figures following, to wit:

*Answer.*

UNITED STATES OF AMERICA,
*District of Kansas, ss:*

In the circuit court of the United States for the eighth circuit and district of Kansas.

ABEL H. PIERCE AND JAMES D. REED, partners in business under the firm name of Pierce & Reed, plaintiffs,
*vs.*
WILLIAM S. TOUGH AND CHARLES L. VANderpool, defendants. } Answer.

Come now the said defendants by their attorneys, and for answer to the petition of the said plaintiffs deny each and every material allegation in said petition contained.

Wherefore the said defendants pray judgment for a return of this property in controversy & ten thousand dollars damages.

GUTHRIE & BROWN,
WM. P. DOUTHITT,
*Att'y for Defend't.*

(Endorsed:) No. 1128. U. S. circuit court, district of Kansas. Pierce and Reed vs. Tough and Vanderpool. Answer. Filed Nov. 9, 1874. A. S. Thomas, clerk , att'ys for def'ts.

And on this day, to wit, the 10th day of May, 1875, in the November term, 1874, of said court, in the record of the proceedings in the above entitled action is the following entry in the words and figures following, to wit:

*Journal entry.*

MONDAY, *May 10th*, 1875.

ABEL H. PIERCE AND JAMES D. REED, partners in business under the firm name of Pierce & Reed.
*vs.*
WILLIAM S. TOUGH AND CHARLES L. VANderpool, defendants. } 1128.

On motion of defendants by Guthrie & Brown and W. P. Dou-

19 thitt, their attorneys, it is ordered by the court that they be and are hereby allowed ten days from this date to file an amended answer herein, and plaintiff allowed twenty days from this date to file reply thereto.

And on this day, to wit, the 9th day of June, 1875, in the June term, 1875, of said court, in the record of the proceedings in the above entitled action is the following entry in the words and figures following, to wit:

*Journal entry.*

WEDNESDAY, *June 9th*, 1875.

PIERCE & REED
*vs.*
WILLIAM S. TOUGH AND CHARLES L. VANderpool. } 1128.

It is ordered by the court that this case be and the same is hereby continued to the next term of this court as per stipulation on file.

And on these days, to wit, the 30th day of November, 1875, and the 10th day of December, 1875, in the November term of said court, in the record of the proceedings in the above entitled action is the following entry in the words and figures following to wit:

*Journal entry.*

TUESDAY, *November* 30, 1875.

PIERCE & REED
*vs.*
WILLIAM S. TOUGH AND CHARLES L. VANderpool. } 1128.

It is ordered by the court that this cause be continued one day at the costs of the plaintiffs.

*Journal entry. Order appointing special marshal.*

FRIDAY, *December* 10, 1875.

PIERCE & REED, PLAINTIFFS,
*vs.*
20 WILLIAM S. TOUGH & CHARLES L. Vanderpool, defendants. } 1128.

On motion of the plaintiffs in the above action, it is ordered that Chester Thomas, jr., of Shawnee County, Kansas, be and he is hereby appointed a special marshal to serve all processes, orders, or notices to be hereafter served in the above entitled action.

*Journal entry.*

FRIDAY, *December* 10, 1875.

ABEL H. PIERCE AND JAMES D. REED, plaintiffs,
*vs.*
WM. S. TOUGH AND CHARLES L. VANDERpool, defendants. } 1128.

And now comes the plaintiffs by Martin & Case, their attorneys, and

also comes the defendants by Wm. P. Douthitt and Guthrie & Brown, their attorneys, and thereupon the plaintiffs move the court for leave to amend generally their petition herein and to make Spencer P. Wade a defendant in this action, which motion is granted by the court, subject to such objections as said Wade may make thereto, and the right is reserved said Wade to be heard against said amendment, and the plaintiffs are given sixty days from this date to file an amended petition herein, and that upon the filing of said amended petition that a summons be issued and served upon said Spencer P. Wade, and that he be required to object to or plead to or answer said amended petition within the time required by the laws of the State of Kansas. It is further ordered that the other defendants have ninety days from this date in which to file an amended answer herein. It is further ordered that this action be continued until the next term of this court, and that the same be set for trial on the second day of said term and that the plaint-
21 iffs pay the costs of this action at the present term of this court.

JOHN F. DILLON, *Judge.*

And on this day, to wit, the 24th day of January, 1876, the said plaintiffs, by Martin & Case, their attorneys, filed in the clerk's office of said court their amended petition in the above-entitled action, which said amended petition, with the endorsements thereon, is in the words and figures following, to wit:

*Amended petition.*

UNITED STATES OF AMERICA,
*District of Kansas, ss:*

In the circuit court of the United States for the eighth circuit and district of Kansas.

| | |
|---|---|
| ABEL H. PIERCE AND JAMES D. REID, partners in business under the firm-name of Pierce & Reid, plaintiffs, *vs.* WILLIAM S. TOUGH, CHARLES L. VANDERPOOL, & Spencer P. Wade, defendants. | No. 1128. Amended petition. |

The plaintiffs say—

I. They were at the commencement of this action, and still are, residents and citizens of the State of Texas.

II. The defendants were at the commencement of this action, and still are, residents and citizens of the State of Kansas.

III. The plaintiffs were at the commencement of this action, and still are, partners in business under the firm-name of Pierce & Reid.

IV. They were at the commencement of this action, and still are, the legal owners of, and were then and still are entitled to the immediate possession of, the following described personal property, namely:

Four hundred and thirty-three (433) head of Texas steers,
22 branded with a horse-shoe mark on the left side, varying from two to six years old, and known as the Murphey herd.

Four hundred and ten (410) head of Texas steers, branded with a horse-shoe mark on the left hip, varying from two to six years old, and known as the Aleck Wood herd.

Four hundred (400) head of Texas steers, branded with a horse-horse mark on the left hip, varying from two to six years old, and known as the West herd.

Four hundred and forty-two (442) head of Texas steers, branded with

a horse-shoe mark on the left hip, varying from two to six years old, and known as the Aleck McDonald herd.

Four hundred (400) head of Texas steers, branded with a horse-shoe mark on the left hip, varying from two to six years old, and known as the Fuller herd.

Four hundred and twenty-seven (427) head of Texas steers, branded with a horse-shoe mark on the left hip, varying from two to six years old, and known as the Fenton herd.

Six hundred and sixty-five (665) head of Texas steers, branded with a horse-shoe mark on the left hip, varying from two to six years old, and known as the Seltzer & Chipman herds.

Four hundred and fifty (450) head of Texas steers, varying from two to six years old, all branded with a horse-mark on left hip, known as Horace Griffin's herd.

Four hundred and fifty (450) head of Texas steers, varying from two to six years old, all branded with a horse-horse mark on the left side and left hip, known as Adam Dupay's herd.

Four hundred and fifty (450) head of Texas steers, varying from two to six years old, all branded with a horse-shoe mark on left hip, known as S. S. Blayton's herd.

Two hundred and twenty-five (225) head of Texas steers, varying from two to six years old, all branded with a horse-shoe mark on left
23 hip, and known as John A. Taylor's herd.

Two hundred and twenty-five (225) head of Texas cows & heifers, from one to six years old, all branded with a horse-shoe mark on left hip, and known as the Ottenger herd.

Four hundred and fifty (450) head of Texas steers, varying from two to six years old, all branded with a horse-shoe mark on left hip, and known as the Tom Walker's herd; which said herd is also called and known as the Levi M. Philipps herd, and is one & the same herd.

Three hundred and sixty (360) head of Texas steers, branded with a horse-shoe mark on the left hip, varying from two six years old, and known as the Meeta herd, near Kingsville, Shawnee County, Kansas, and being a part of the Meeta & Dummer herds.

Four hundred and seventy-nine (479) head of Texas cows, branded with a horse-shoe mark on the left hip, and from two to ten years old, known as the Oty Lowen herd.

Said steers are worth $35.00 per head, and said cows are worth $20.00 per head, and of the aggregate value of two hundred and six thousand six hundred & fifty dollars.

V. The defendants, before and at the time of the commencement of this action, unlawfully and wrongfully detained the said personal property, goods, and chattels in their possession and from the possession of the said plaintiffs, and had so detained the same as aforesaid for the space of three days before the commencement of this action, to the plaintiff's damage $300,000 00c.

Wherefore the plaintiffs pray for an order against the said defendants, that they may be ordered to deliver the said personal property to the plaintiffs; and also a judgment against the defendants for the said sum of $206,650 00c. (two hundred and six thousand six hundred and fifty dollars), the value of said property, in case a return thereof
24 cannot be had, and for three hundred thousand dollars, their damages sustained as aforesaid for the unlawful and wrongful detention of said property, and costs of suit.

MARTIN & CASE,
*Attorneys for Plaintiffs.*

(Endorsed:) No. 1128. Pierce & Reid vs. Wm. S. Tough et al. No. 1128. Amended petition. Filed Jan'y 24, 1876. A. S. Thomas, clerk.

And on this day, to wit, the 1st day of June, 1876, the said defendant, Spencer P. Wade, filed in the clerk's office of said court his plea in abatement in the above-entitled action, which said plea in abatement, with the endorsements thereon, is in the words and figures following, to wit:

*Plea in abatement.*

In the circuit court of the United States for the district of Kansas.

ABEL H. PIERCE AND JAMES D. REID, partners in business under the firm-name of Pierce & Reed, plaintiffs,
*vs.*
WILLIAM S. TOUGH, CHARLES L. VANDERPOOL and SPENCER P. WADE, defendants.
} Plea in abatement.

And the said Spencer P. Wade comes and says, that the court here ought not to take cognizance of or sustain this action as against him, because, he says, that on the day of October, A. D. 1874, the said plaintiffs commenced their certain action of replevin against him in the district court in and for Shawnee County, and State of Kansas, to recover possession of the specific personal property described in the amended petition herein, and filed the affidavit and bond required by law, and thereupon caused an order of delivery to be issued out of said State court in said action, directed to the coroner of said county (this defendant being sheriff thereof), and on the day of October, A. D. 1874, said coroner took said property (being all such property held or since held by said defendant) out of the possession of this defendant, under and by virtue of said order of delivery, and after holding the same for the time required by law, delivered the same to the said
25 plaintiffs, and this defendant has not since that time had any of said property in his possession or under his control.

That afterwards the said plaintiffs applied to said State court as provided by the acts of Congress in that behalf for the removal of said action of replevin unto this honorable court for trial, and said action is still pending in this court undetermined and awaiting trial of the issues joined therein, and this defendant hereby refers to the records and files therein as a part of this his plea as though the same were incorporated herein; and this defendant further says that the said plaintiffs are both non-residents of the State and district of Kansas, and that if he is compelled to litigate his rights in this action upon said amended petition, he must lose all his rights and remedies belonging to him in case of his recovery upon the replevin bond given him by said plaintiffs and their sureties in said former action of replevin.

PECK & RYAN,
RUGGLES & STERRY AND
CLEMENS & ROSSINGTON,
*Attorneys for Spencer P. Wade, Defendant.*

UNITED STATES OF AMERICA,
*District of Kansas, ss:*

Spencer P. Wade, the above named defendant, being first duly sworn, deposes and says that the facts set forth in the foregoing plea are true.

SPENCER P. WADE.

Subscribed and sworn to before me this 30th day of May, 1876.
[SEAL.] JAMES M. SPENCER,
*U. S. C. Ct. Com'rs for Ka's.*

(Endorsed:) In U. S. circuit court, district of Kansas, No. 1128. Pierce & Reid vs. Tough, Vanderpool and Wade. Plea in abatement of Spencer P. Wade. Filed June 1, 1876. A. S. Thomas, clerk. Peck & Ryan, Ruggles & Sterry, & Clemens & Rossington, attorneys.

And on this day, to wit, the 6th day of June, A. D. 1876, the said defendants filed in the clerk's office of the said court their amended answer in the above entitled action, which said amended answer with the endorsements thereon is in the words and figures following, to wit:

26 *Amended answer.*

In the United States circuit court for the district of Kansas.

ABLE H. PIERCE & JAMES D. REID, PARTNERS in business under the firm name of Pierce & Reid, plaintiffs. } Amended answer.
*vs.*
WILLIAM S. TOUGH & OTHER DEFENDANTS.

Now come the said William S. Tough and Charles L. Vanderpool, defendants, and by leave of the court first had and obtained, and for amended answer to the plaintiff's petition say—

That they deny all and singular the allegations contained in said plaintiff's petition.

And for a further and second defence to the plaintiff's petition, these defendants say, that on the 25 day of August, 1874, and for a long time prior thereto, the defendant W. S. Tough was, and ever since has been, United States marshal for the district of Kansas, duly qualified and acting as such, and the defendant, Charles L. Vanderpool, was on the said 25 day of August, 1874, and for a long time prior thereto was, deputy United States marshal for the district of Kansas, and still is such deputy United States marshal, duly appointed, qualified and acting as such; that on the 3 day of June, 1874, at the June term 1874 of the United States circuit court for the district of Kansas, Samuel M. Stille, James H. Yost, and Elston March by the consideration and judgment of said court recovered against one Andrew Wilson a judgment for the sum of one thousand and fifty and $\frac{35}{100}$ dollars and twenty-one $\frac{65}{100}$ dollars their costs in and about their suit in that behalf laid out and expended in that behalf. Which judgment still remains in that court in full force unreversed and unsatisfied.

That on the 25 day of August, 1874, the said Samuel M. Stelle, James H. Yost, and Elston Marsh cause' an execution in due form of law
27 to duly issued out of said court on said judgment against the good, chattels, lands, and tenements, and chattels real of the said Andrew Wilson, directed to the United States marshal for the district of Kansas, which execution on the 25 day of August, 1874, came into the hands of the said W. S. Tough as United States marshal to be by him executed, and on the 24 day of September, 1874, the said Tough as such marshal, by C. L. Vanderpool, deputy United Stated marshal as aforesaid, levied the said execution on the following good and chattels in the plaintiff's petition mentioned as the property of the said Andrew Wilson, to wit: One herd of 479 head of Texas cows, branded

with a horseshoe on the left hip, known as the Ote Lowen herd, in Shawnee County, in said State and district.

That on the 25 day of September, 1874, the said W. S. Tough as United States marshal, by the said C. L. Vanderpool, deputy as aforesaid, levied the said execution on a herd of 427 head of Texas steers, branded with a horseshoe mark on the left hip, known as the Fenton herd; and on a herd of 400 head of Texas steers, branded with a horseshoe mark on the left hip, known as the West herd; and on a herd of 410 head Texas steers, known as the Woods herd, branded with a horseshoe mark on the left hip; and on the 28 day of September, 1874, on a herd of 433 head of Texas steers, branded with a horseshoe mark on the left side, known as the Murphy herd; on a herd of 442 head of Texas steers, branded with a horseshoe mark on the left hip, known as the McDonald herd; and on the 29 day of September, 1874, on a herd of 400 Texas steers, branded with a horseshoe mark on the left hip, known as the Fuller herd; and on the 30 day of September, 1874, on two herds of Texas steers, 665 head, branded with a horseshoe on the left hip, known as the Chipman and Seltzer herds, in Jackson County, in said State and district of Kansas; on a herd of 360 head Texas steers,
28 branded with a horseshoe mark on the left hip, known as the Meete herd, in Shawnee County, in said State and district of Kansas.

And defendants further says, that on the 8 day of June, 1874, at the June term of said United States circuit court for the district of Kansas, the First National Bank of Springfield, Illinois, a banking association duly existing and organized under the laws of Congress, located and doing business in the city of Springfied, in the State of Illinois, by the consideration and judgment of the said United States circuit court for the district of Kansas, recovered a judgment against the said Andrew Wilson for the sum of ten thousand nine hundred and seventy-one $\frac{59}{100}$ dollars debt and twenty-two $\frac{80}{100}$ dollars its costs in and about its suit paid, laid out and expended, which judgment still remains in that court in full force unreversed and unsatisfied; that on the 21 day of September, 1874, the said First National Bank of Springfield, Illinois, cause' an execution in due form of law to be duly issued out of said court on said judgment against the goods, chattels, lands and tenements and chattels real of the said Andrew Wilson, directed to the United States marshal for the district of Kansas, which execution on 21 day of September, 1874, came into the hands of the defendant, W. S. Tough, as such marshal to be by him executed, and at the several times and places the said W. S. Tough, as such marshal, by the said C. L. Vanderpool as such deputy marshal, levied the same on the said goods and chattels hereinbefore described as the property of the said Andrew Wilson, and then and there by virtue of said executions and levies there seized and took said property into their possession, and at the commencement of this action the said W. S. Tough and the said C. L. Vanderpool, under and by virtue of the said executions and levies, held and were entitled to the immediate possession of the said goods and chattels; and the said
29 Tough and Vanderpool, defendants, aver that at the times of the levys of said executions on said property and at the time of the commencement of this action the same was the property of the said Andrew Wilson and not the property of the said plaintiffs.

Wherefore the said defendants pray judgment for the return of the said property.

W. P. DOUTHITT.
GUTHRIE & BROWN,
*Attorneys for Defen'ts.*

(Endorsed:) No. 1128. Pierce & Reed vs. Tough & Vanderpool. Amended answer. Filed June 6, 1876. A. S. Thomas, clerk. Let this amended answer be filed as of January, 1876. Jno. Martin.

And on this day, to wit, the 7th day of June, 1876, the said plaintiffs filed in the clerk's office of said court their reply to 2nd defence of amended answer in the above-entitled action; which said reply, with the endorsements thereon, is in the words and figures following, to wit:

*Reply.*

UNITED STATES OF AMERICA,
*District of Kansas:*

In the circuit court of the United States for the district of Kansas.

ABEL H. PIERCE AND JAMES D. REED, PL'FFS,
*vs.*
WILLIAM S. TOUGH AND CHARLES VANDERPOOL, def'ts.

Pl'ffs, for reply to the 2nd defense stated in the def'ts amended answer herein, denies that the judgment in favor of Stelle, Yost & Co., and against said Andrew Wilson, for $1,050.35, mentioned in said amended answer, still remain in full force, unreversed or unsatisfied. They deny that the judgment in favor of the First National Bank of Springfield, Illinois, and against said Andrew Wilson, for $10,971.59, still remains unsatisfied. They deny that at the commencement of this suit, or at any time, the defendants, or either of them, were entitled to the immediate possession of the goods & chattels described in said amended answer. They deny that def'ts, or either of them, were at the time of the alleged levies of said executions on said property, or at any time, the said property mentioned in said amended answer, or any part thereof, was the property of said Andrew Wilson.

MARTIN & CASE,
*Atty's for Pl'ffs.*

(Endorsed:) No. 1128. Pierce & Reed vs. William S. Tough & Chas. Vanderpool. Reply to 2nd defense of amended answer. Filed June 7, 1876. A. S. Thomas, clerk.

And on the same day, to wit, the 7th day of June, 1876, the parties, by their attorneys, filed in the clerk's office of said court their stipulation in the above entitled action; which said stipulation, with the endorsements thereon, is in the words and figures following, to wit:

*Stipulation waiving jury.*

In the circuit court of the United States for the district of Kansas.

PIERCE & REED
*vs.*
WM. S. TOUGH & CHAS. L. VANDERPOOL. } 1128.

The parties hereto hereby waive a jury in this action and submit it to the court for trial.

June 7, 1876.

MARTIN & CASE,
*Attorneys for Pl'f.*
WM. P. DOUTHITT &
GUTHRIE & BROWN,
*Att'ys for Tough & Vanderpool.*

(Endorsed:) No. 1128. Pierce & Reed vs. W. S. Tough & C. L. Vanderpool. Stipulation waiving jury. Filed June 7, 1876. A. S. Thomas, clerk.

And on this day, to wit, the 7th day of June, A. D. 1876, in the June term (1876) of said court, in the record of the proceedings in the above-entitled action is the following entry in the words and figures following, to wit:

*Journal entry.*

| | | |
|---|---|---|
| 31 | PIERCE & REED<br>*vs.*<br>WILLIAM S. TOUGH AND CHARLES L. VANderpool. | 1128. |

WEDNESDAY, *June* 7, 1876.

On motion of said plaintiffs, it is ordered by the court that said plaintiffs have leave to withdraw their last amended petition filed herein.

*Judgment.*

| | | |
|---|---|---|
| ABEL H. PIERCE AND JAMES D. REID, PARTners in business under the firm-name of Pierce & Reid, plaintiffs,<br>*vs.*<br>WILLIAM S. TOUGH AND CHARLES L. VANderpool, defendants. | 1128. | Judgment in replevin. |

WEDNESDAY, *June* 14, 1876.

And now comes the plaintiffs, Abel H. Pierce and James D. Reid, partners under the firm-name of Pierce & Reid, in person, and by Martin & Case and L. C. Slavens, their attorneys; and also come the defendants, William S. Tough and Charles L. Vanderpool, in person, and by Guthrie & Brown and Douthitt & McFarland, their attorneys, and by agreement in writing of all parties hereto, duly signed and filed, a jury is waived and this cause is submitted to the court for trial, and upon the proofs and allegations by the parties submitted the court finds:

First. That the plaintiffs were, at the commencement of this action, and now are, the owners of and entitled to the immediate possession of all the cattle and personal property mentioned and described in their petition, except as hereinafter stated.

Second. That on the 21st day of September, 1874, an execution was duly issued out of the circuit court of the United States for the
32 district of Kansas, upon a judgment theretofore rendered in said court in an action wherein the First National Bank of Springfield, Illinois, was plaintiff and one Andrew Wilson was defendant; that said execution came into the hands of the defendant, Charles L. Vanderpool, who was then and ever since has been a deputy marshal of the United States for the district of Kansas, and that on the 24th day of September, 1874, said marshal executed said writ of execution "by levying on a herd of four hundred seventy-nine head of Texas cows, branded with a horse-shoe mark on the left hip, known as the Lowen herd, as the property of A. Wilson."

Third. That the person in charge of said last-named cattle reported

to the said deputy marshal, at the time of said levy, that the number of cattle in the herd so levied upon was four hundred and seventy-nine head, and were branded horse-shoe on the left hip; but the court finds that in fact there were in said herd, at the time of said levy, two hundred head of Texas cows branded "A. W." which were the property of said execution debtor, Andrew Wilson, and that the brand of said Wilson was "A. W.", and that it was the intention of said deputy marshal to levy upon the whole herd.

Fourth. That all the cattle in said Lowen herd branded horse-shoe on the left hip were the property of the plaintiffs, and that they were entitled to the immediate possession of the same at the commencement of this suit, and were two hundred and seventy-nine in number.

Fifth. That the plaintiffs in this action sued for only four hundred and seventy head of Texas cows branded horse on the left hip, known as the Lowen herd. That the writ of replevin in this action, the marshal's return on the said writ of execution, and the receipt given by the plaintiffs to the special marshal who executed said writ of re-
33 plevin against the defendants, each show and were for only four hundred and seventy-nine head of Texas cows branded horse-shoe on the left hip, and known as the Lowen herd.

Sixth. That the two hundred head of Texas cows, branded "A. W.," that constitute a part of the Lowen herd, were in the herd at the time; that the writ of replevin in this action was executed, and that the special marshal in executing said writ of replevin seized the whole herd known as the Lowen herd, including the 279 head of plaintiff's cattle branded horseshoe, and also the two hundred head branded "A. W.," and in further execution of said writ he delivered to the plaintiffs and took their receipt for 479 head of cattle branded horseshoe, as shown by his return to said writ.

Seventh.

Eighth. That at the time of the commencement of this action, and at the time of execution of the said writ of replevin, and at the time of receiving the cattle from the special marshal, the plaintiffs had no knowledge that the defendant Vanderpool claimed, by virtue of his levy of said execution, any other cattle in the Lowen herd than the 479 head of Texas cows branded horseshoe, as mentioned and described in his return to said execution, nor did the plaintiffs intend to include any of the cattle branded "A. W." in this action, nor did the special marshal, who executed said writ of replevin, take possession of said two hundred head of Texas cows branded "A. W." by direction of or with the knowledge of the plaintiffs or either of them.

Ninth. That the plaintiffs did not know at the time of the execution of said writ of replevin, or at the time of the delivery of the cattle to them by the said special marshal under said writ, that the whole or any part of the Texas cows branded "A. W.," and constituting a part of the
34 Lowen herd, had been taken possession of by said special marshal under said writ of replevin, nor were said last-named cattle included or intended to be included in the receipt given by the plaintiffs to said special marshal.

10th. That the said 200 cows branded "A. W." were, at the beginning of the suit, of the value of $2,500.00, the proceeds of which were received by the plaintiffs when they sold the cattle.

11th. And the court further finds, as a conclusion of law, that the defendants were, at the commencement of this action, entitled to the immediate possession of the said 200 head of Texas cows branded "A. W.," as aforesaid, and are entitled to a judgment against the pl'ffs for a

return thereof, or the value of the same, in case a return thereof cannot be made.

To which findings of facts and conclusion of law the plaintiffs except.

It is therefore considered and adjudged by the court that the pl'ffs do have and recover from the said defendants the possession of all the cattle and personal property mentioned and described in pl'ffs petition, except 200 head of Texas cows branded "A. W.," and being a part of the said Lowen herd.

And it is further considered and adjudged by the court that the defendants do have and recover from the plaintiffs the possession of the said two hundred Texas cows branded "A. W.," as aforesaid, and being a part of the said Lowen herd, and that the said pl'ffs return to the said defendants the said last-named two hundred head of cows, and in case a return thereof cannot be had, that then said defendants do have and recover from the said plaintiffs the said sum of twenty-five hundred dollars, the value thereof as aforesaid, and hereof let execution issue.

And it is further ordered and adjudged by the court that the plaintiffs do have and recover of and from the defendants $125 of the
the costs herein expended, and no more, and hereof let execution
35 issue, and that said defendants have and recover of and from the
plaintiffs the balance of the costs herein taxed at $ , and hereof let execution issue; to which judgment and order of the court in favor of the defendants and against the plaintiffs the plaintiffs except.

JOHN F. DILLON,
*Judge.*

And on this day, to wit, October 23rd, 1876, the plaintiffs, by their attorneys, filed in the clerk's office of said court their appeal bond in said entitled action, which said appeal bond is in the words and figures following, to wit:

*Appeal bond.*

Circuit court of the United States for the district of Kansas.

Know all men by these presents that we, G. B. Inge and J. W. L. Slavens, are held and firmly bound unto William S. Tough and Charles L. Vanderpool in the sum of three hundred dollars, to be paid to the said Tough and Vanderpool, their executors and administrators; to the payment of which well and truly to be made we bind ourselves and each of us jointly and severally, and each of our heirs, executors, and administrators firmly by these presents, sealed with our seals, and dated this the 14th day of October, 1876.

The condition of this obligation is such, that whereas the said Wm. S. Tough and Charles Vanderpool have recovered a judgment in the circuit court of the United States for the district of Kansas against Abel H. Pierce and James D. Reed for the recovery of certain cattle therein
specified, and for the sum of twenty-five hundred dollars, the
36 value thereof, in case return of said cattle cannot be had, which
said judgment was rendered at the May term of said court held at the city of Leavenworth, in said State of Kansas; and whereas the said Abel H. Pierce and James D. Reed, in order to obtain a reversal of the same, hath sued out a writ of error to the Supreme Court of the United States: Now, therefore, if the above-named Abel H. Pierce and James D. Reed shall prosecute their said writ of error to effect, and shall answer and pay all costs if they shall not not make good their plea, then

this obligation shall be void, otherwise the same shall remain in full force and virtue.

[L. S.] J. W. L. SLAVENS.
[L. S.] G. B. INGE.

Approved.

[L. S.] C. G. FOSTER, *Judge.*

STATE OF MISSOURI,
*Jackson County, ss:*

L. C. Slavens, on his oath, says that G. B. Inge and J. W. L. Slavens, who signed the above and foregoing bond for costs—that said G. B. Inge is a resident of the State of Kansas, and is worth, in property situated in the State of Kansas consisting of real estate, more than one thousand dollars over and above all exemptions and liabilities, and that said J. W. L. Slavens is worth over and above all exemptions and liabilities more than fifty thousand dollars.

L. C. SLAVENS.

Sworn to and subscribed before me, a notary public duly qualified, Nov. 27, 1874, and whose term of office will expire Nov. 27, 1878,
37, 38 this 18th day of October, 1876.

[SEAL.] C. W. FREEMAN,
*Notary Public.*

(Endorsed:) No. 1128. Pierce & Reed vs. W. S. Tough & Chas. L. Vanderpool. Bond for costs. Filed Oct. 23, 1876. A. S. Thomas, clerk.

39 UNITED STATES OF AMERICA,
*District of Kansas, ss:*

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and perfect copy from the record of all the proceedings in the action of Abel H. Pierce and James D. Reed, partners in business under the firm name of Pierce & Reed, vs. William S. Tough and Charles L. Vanderpool, No. 1128 in said .

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this second day of January, A. D. 1877.

[SEAL.] A. S. THOMAS, *Clerk.*

40 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Kansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court before you, between Abel H. Pierce and James D. Reed, partners in business under the firm name of Pierce & Reed, plaintiffs, and William S. Tough and Charles L. Vanderpool, defendants, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint, appears; we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the

United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 23rd day of October, A. D. 1876.

[SEAL.]

A. S. THOMAS,
*Clerk of the Circuit Court of the United States for the District of Kansas.*

Allowed.

C. G. FOSTER, *Judge.*

41 (Indorsed:) No. 1128. Pierce & Reed vs. William S. Tough and Charles L. Vanderpool. Writ of error. Filed Nov. 29, 1876. A. S. Thomas, clerk.

42 UNITED STATES OF AMERICA, *ss:*

To William S. Tough and Charles L. Vanderpool:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United State for the district of Kansas, wherein Abel H. Pierce and James D. Reed are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

Witness:

C. G. FOSTER, *Judge.*

TOPEKA, KANSAS, *December 1st*, 1876.

We hereby acknowledge service of the above citation upon us the day & year above written.

W. S. TOUGH,
C. L. VANDERPOOL,
By GUTHRIE BROWN,
*Their Att'ys.*

(Indorsed:) No. 1128. Pierce & Reed vs. Wm. S. Tough & Chas. L. Vanderpool. Citation. Filed Dec. 1, 1876. A. S. Thomas, clerk.

(Indorsement on cover:) No. 188. Abel H. Pierce and James D. Reed, partners as Pierce & Reed, plaintiffs in error, vs. William S. Tough and Charles L. Vanderpool. Kansas C. C. U. S. Filed 26th September, 1877.

NO. 188.

# In the Supreme Court of the United States.

ABEL H. PIERCE,
and
JAMES D. REED,
} Pl'ffs in Error,

vs.

WILLIAM S. TOUGH
and
CHAS. L. VANDERPOOL,
} Def'nts in Error.

L. C. SLAVENS,
NELSON COBB,
Att'ys for Plaintiffs in Error.

Moore, Printer, Kansas City.

NO. 188.

# In the Supreme Court of the United States.

ABEL H. PIERCE,
and
JAMES D. REED, } Pl'ffs in Error,

vs.

WILLIAM S. TOUGH
and
CHAS. L. VANDERPOOL, } Def'nts in Error.

This is an action of replevin to recover possession of something over six thousand head of Texas cattle branded with a "horse-shoe" brand, which the defendants, as U. S. Marshal and Deputy U. S. Marshal, for the District of Kansas, have levied upon by virtue of certain executions duly issued against one A. Wilson.

All the cattle sued for in this action, are described in the petition as being branded with a "horse shoe" brand.

At the commencement of this action, there were along with these "horse shoe" cattle sued for, two hundred cows branded "A. W.," which were the property of A. Wilson.

The special marshal in executing the writ of replevin, delivered to the plaintiffs, along with the horse shoe cattle which they had sued for, these 200 "A. W." cows, which the plaintiffs did not know at the time were with their cattle. A jury being waived, the court upon the submission of the case, made special findings of facts and conclusions of law, to which the plaintiffs excepted, and the court rendered judgment in favor of plaintiffs for all the horse shoe cattle which they sued for, and in favor of defendants for the return of the two hundred

"A. W." cows, or their value—$2,500, if return could not be made.

The conclusion of law found by the court, upon which this judgment in favor of defendants was based is as follows:

"XI. And the court further finds, as a conclusion of law, that the defendants were, at the commencement of this action, entitled to the immediate possession of said two-hundred head of Texas cows branded "A. W." as aforesaid, and are entitled to a judgment against the plaintiffs for a return thereof, or the value of the same if a return thereof cannot be made."

ERROR.

The court erred it its finding and conclusions of law, and in rendering judgment against plaintiffs for the return of the two hundred "A. W." cows, or the value thereof—2,500.00, if return could not be made; because said two hundred "A. W." cows were *not in issue* in this action.

Not only does the petition show this, but in the 8th finding of the court (see page 21, printed record,) the court expressly found that plaintiffs did not intend to sue for any "A. W." cattle. The latter part of this 8th finding of the court is as follows:

"Nor did the plaintiffs *intend to include any* of the cattle branded "A. W.," *in this action*, nor did the special marshal who executed said writ of replevin, take possession of said two hundred head of Texas cows branded "A. W." by direction of, or with the knowledge of plaintiffs, or either of them."

The 9th finding of the court also shows that plaintiffs did not sue for any "A. W." cattle. It is as follows:

"IX. That plaintiffs did not know at the time of the execution of said writ of replevin, or at the time of the delivery of the cattle to them by the said special marshal, under said writ, that the whole or any part of the Texas cows branded "A. W." and constituting a part of the Lowen herd, had been taken possession of by said special marshal under said writ of replevin, nor were said last named cattle *included or intended to be included in the receipt* given by the plaintiffs to said special marshal."

It must be remembered that Texas cattle are not kept in enclosures, but being of a wild nature, are grazed in herds on the plains, and are bought and sold by the "brand;" and it is not uncommon to find in any herd, cattle that have strayed in from other neighboring herds.

## AUTHORITIES.

In Lovensohn *et al.*, *vs.* Galland *et al.*, 45 Cal., p. 8, the court says:

"The action is replevin, and the subject matter of the litigation in such case necessarily consists *only* of the property described in the complaint, and it is not competent to the defendant by his answer, to introduce a new and distinct subject matter of litigation, by claiming of the plaintiffs the release and return of other and distinct personal property, even though he present such a case as would have enabled him to recover in an independent action."

The same principle is decided in Shelton *vs.* Franklin, 68 Ills., p. 333, where it is held that, in replevin, the verdict of the jury must be consistent with the issues presented by the pleadings.

But it seems to me, authority is not needed on so plain a proposition.

The ruling of the court below is not only unjust to the plaintiffs, but if upheld, must seriously affect their bondsmen, by enlarging their liability.

These bondsmen knew that plaintiffs were the owners of the "horse shoe" cattle; they saw from the petition and affidavit for replevin that plaintiffs had sued for "horse shoe" cattle only, and hence, were willing to go on their bond; and it would be an outrage to make them liable for the return, or value, of any *other* cattle, which, by chance, might have been delivered to plaintiffs by the officer executing the writ of replevin, along with the cattle sued for.

## JURISDICTION.

The amount in controversy in this suit, as shown by the affidavit of replevin, filed by A. H. Pierce at the commencement

of the suit is over 80,000.00, to say nothing of the damages claimed.

In Walker *vs.* United States, 4th Wallace, p. 163, the Chief Justice delivering the opinion of the Court says:

"It has been a good deal controverted whether the sum or value in controversy is to be determined by reference to the amount claimed, or the amount of the judgment, or the amount in dispute in this court. It has long been settled, however, that when the judgment is for the defendant, or for the plaintiff, and for less than two thousand dollars, and the *plaintiff* sues out the writ of error, this court has jurisdiction if the damages claimed in the declaration exceed that sum; but that if the judgement is for the plaintiffs and not more than two thousand dollars, and the *defendant* prosecutes in error, this court has not jusisdiction, for the amount in controversy, as to the defendant, is fixed by thejudgment."

In the case at bar, the judgment is against the plaintiffs and though for less than $500.00, this court has jurisdiction because the plaintiffs prosecute error, and the amount in controversy in this suit is the value of the property claimed in their petition.

The judgment ought to be reversed.

L. C. SLAVENS,
NELSON COBB,
Att'ys for Plaintiffs in Error.